RECENT CASES.

AGENCY — EFFECT OF STATUTES ON RELATION — MASTER'S LIABILITY TO PROVIDE SAFE PLACE TO WORK. — A Tennessee statute required the employment of a licensed foreman in every mine; conferred on such foreman control of specified parts of the operation of the mine; relieved him from the control of the owner; and imposed penalties to secure faithful service by him. The plaintiff, one of the defendant's miners, was injured by a fall of slate from the roof of the room in which he was working, due to the negligent performance by the foreman of a duty imposed by the statute. The foreman was duly licensed and competent. *Held*, that the plaintiff cannot recover. *Sale Creek Coal & Coke Co.* v. *Priddy*, 96 S. W. Rep. 610 (Tenn.).

The mere fact that statutes require certain employees to be licensed, thereby limiting the employer's field of selection, does not prevent such employee from being a servant for whose negligence the master is liable. *Martin* v. *Temperley*, 4 Q. B. 298. But this statute goes further. By removing from the mine-owner the right of control over details, it changes his foreman from his servant, as he otherwise would be, to an independent contractor. Cases such as this are rare, and the courts have not always realized the true relation of the parties. See *Durkin* v. *Kingston Coal Co.*, 171 Pa. St. 193. A master, however, by employing an independent contractor cannot divest himself of his liability to provide his servants with a safe place to work. *Herdler* v. *Buck's Stove Co.*, 136 Mo. 3. Employing a foreman prescribed by statute should not be enough to relieve him from such liability. *Smith* v. *Drayton Co.*, 115 Tenn. 543; *contra*, *Williams* v. *Thacker Coal Co.*, 44 W. Va. 599. Whether this statute in giving control of certain matters to an independent contractor relieves the owner of such liability *pro tanto*, the court does not consider, and the question must be considered as open. We may support the decision by saying that a room in a mine is not a place provided for work, but a temporary instrumentality, as a scaffolding or ditch. *Coal & Mining Co.* v. *Adm. of Clay*, 51 Oh. St. 542.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSONS IN TORT — STOCK CERTIFICATE FORGED BY SECRETARY OF COMPANY. — The secretary of a company, acting for private purposes, forged a certificate of shares in the company. The certificate was perfectly regular in form, sealed with the seal of the company, and attested with the signatures of two directors, which signatures were forged. *Held*, that persons who, relying on the certificate, have advanced money to the secretary cannot recover from the company, and that the company is not estopped from denying the invalidity of the certificate. *Ruben & Ladenburg* v. *The Great Fingall Consolidated Co.*, 95 L. T. R. 214 (Eng., H. L., July 19, 1906).

For a discussion of this case in the lower court, see 18 HARV. L. REV. 144.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY FOR AMOUNT OF SECURITIES FALSELY DECLARED BY AGENT TO REPRESENT INVESTMENT OF PRINCIPAL'S MONEYS. — The defendants' testator, the executor of a will, was appointed by the plaintiffs their attorney in fact to keep invested the sums due them as beneficiaries under the will. He falsely represented to them in his accounts that he held these sums invested in certain mortgages, and regularly paid them money as interest thereon. The accounts were accepted by the plaintiffs, and the representations believed. *Held*, that the defendants are liable for the amounts represented by such alleged investments. *Hartmann* v. *Schnugg*, 35 N. Y. L. J. 943 (N. Y., App. Div., June, 1906).

For aught that appears, the testator had cared for the plaintiffs' moneys with due fidelity. Hence his estate would be liable to account only for that property of the plaintiffs which he actually had, unless the root of a further liability is found in his misrepresentations. Although the court gives no reasons and cites no authorities, yet its decision seems to be reached by enforcing an equitable estoppel, inasmuch as the liability imposed on the testator's estate is coincident

with the liability which would have been imposed had the representation been true. The elements of estoppel by misrepresentation may be outlined thus: a misrepresentation as to present or past facts, wrongfully made with foresight of or reason to foresee another's acting upon it, and in fact believed and prejudicially acted upon by that other. See EWART, ESTOPPEL, 10. In the present case the essentials are undoubtedly complete, if the plaintiffs changed their position prejudicially, — a point ignored in the court's statement of facts. Relative change of position, however, might well be found in the plaintiffs' allowing their moneys to remain under the testator's control. See *Continental, etc., Bank* v. *Nat'l Bank*, 50 N. Y. 575, 584; *cf. Skyring* v. *Greenwood*, 4 B. & C. 289. Moreover, very slight damage has been held sufficiently to prejudice the deceived party. See *Knights* v. *Wiffen*, L. R. 5 Q. B. 660, 665; also 19 HARV. L. REV. 113.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — DECISION BY DIVIDED COURT. — On appeal in a personal injury case, where the questions involved in the appeal related to the accuracy of the lower court's instructions, two justices considered the instructions erroneous and also a ground for a new trial. Of the two remaining justices, both of whom opposed the granting of a new trial, one did so on the ground that the appellant's case was not prejudiced, though admitting that, as matter of law, there was error. *Held*, that the appeal should be allowed. *Hawley* v. *Wright*, 39 Nova Scotia 1.

It is a well-recognized rule that when an appellate court stands equally divided the decision appealed from shall be left in *statu quo*. The exception involved in the present case is perhaps due to the fact that, although on the final question as to whether or not a new trial should be granted, there was an equal division, the legal error committed by the lower court was conceded by a majority.

APPEAL AND ERROR — WAIVER OF RIGHT TO PROSECUTE SECOND APPEAL — In an action to compel the defendant to repair a street and to rebuild sidewalks, the lower court granted the relief demanded except as to the sidewalks. The defendant appealed from the unfavorable part of the decree, and it was affirmed. The plaintiff thereafter appealed from the remainder of the decree. *Held*, that a motion to dismiss the appeal be denied. *State* v. *Northern Pac. Ry. Co.*, 109 N. W. Rep. 238 (Minn.).

This decision is based on the construction of a statute permitting either party to appeal from the portion of a judgment which he deems erroneous, and on a rule of court. Under such a statute, unless the respondent could and should have presented and had corrected on the first review the errors of which he now complains, the second appeal is of course proper. *Page* v. *People*, 99 Ill. 418. The majority view, with which this case agrees, is that the right to cross-assign errors on the first appeal, which is quite generally given either by rule of court or by common practice, is permissive and not obligatory. *Guarantee Co.* v. *Insurance Co.*, 124 Fed. Rep. 170. A better view is that if the whole record has been once before the court, and the present appellant could have filed cross-assignments of error, it was his duty to do so, and in default thereof he waived his right to appeal. *Scully* v. *Smith*, 66 Kan. 265. This prevents multiplicity of suits, doubling the costs, and simplifies procedure. *Horne* v. *Harness*, 18 Ind. App. 214. If, however, the decision correctly interprets the Minnesota rule of court as not permitting cross-assignments of error, the case may be sustained on that ground.

BANKRUPTCY — PROVABLE CLAIMS — COUNTERCLAIM AFTER EXPIRATION OF ONE YEAR. — In a suit by a trustee in bankruptcy, begun more than a year after the adjudication, the debtor endeavored to diminish or defeat the claim by pleading a claim for damages for breach of contract by the bankrupt before his bankruptcy. *Held*, that the claim may be proved by way of counterclaim. *Norfolk & W. R. Co.* v. *Graham*, 16 Am. B. Rep. 610 (C. C. A., Fourth Circ., May, 1906).

§ 57 n of the Bankruptcy Act of 1898 limits the time within which claims may be proved against the estate to one year from the adjudication. § 68 b (1) of the Act provides that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt, which is not "provable" against the estate. In the former Act of 1867 the corresponding phrase used was "in its nature provable." The change has caused some speculation, but it seems agreed that the new language has substantially the same meaning as the old. *Morgan* v. *Wordell*, 178 Mass. 350. There are a few expressions to be found that provability depends upon the status of the claim at the time of filing the petition. See *In re Bingham*, 94 Fed. Rep. 796. The weight of authority, however, is that "provable" means provable in its nature at the time when the counterclaim or set-off is filed. See *Morgan* v. *Wordell, supra.*

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — CONDITIONAL CREDIT TO DEBTOR AS CONSIDERATION. — A negotiable certificate of deposit issued by the X bank and endorsed by the depositor in blank, was delivered by him to the A bank for collection. By the A bank it was given to the B bank, which transferred it to the plaintiff C bank, its creditor, and the latter credited the B bank on its books. The C bank sued the X bank and the depositor. *Held*, that, since the credit given was conditional and not absolute, there can be no recovery, even under the Negotiable Instruments Law. *Commercial Nat'l Bank* v. *Citizens' State Bank*, 109 N. W. Rep. 198 (Ia.).

The Negotiable Instruments Law provides that an antecedent or pre-existing debt shall constitute value. The argument relied on by the court to take this case out of the provisions of the statute is that, if the instrument were dishonored, recourse could be had to the original obligation from the B bank to the plaintiff, and the credit given was therefore conditional. This is true, but in every case credit for negotiable paper is in this sense conditional, and it is clearly the intention of the statute to cover such cases. If the fact were that the plaintiff knew that the certificate of deposit was deposited originally for collection, the result reached would be correct. In such a case the plaintiff would have been in the position of a trustee or agent. *Peck* v. *First Nat'l Bank*, 43 Fed. Rep. 357. One of the cases cited seems to suggest that something of this sort may have been in the court's mind. *Old Nat'l Bank* v. *German Bank*, 155 U. S. 556. But if so, the entire discussion on which the court relies would be unnecessary.

CARRIERS — DELAY — DUTY TO INFORM PASSENGERS OF CIRCUMSTANCES LIKELY TO CAUSE DELAY. — The plaintiff was travelling from Jacksonville to Columbia *via* Savannah on the defendant railroad. The defendant knew there were quarantines at both Savannah and Columbia. In response to inquiries the plaintiff was informed about the latter, but nothing was said of the former. *Held*, that the plaintiff can recover for delay caused by the Savannah quarantine. *Hasseltine* v. *Southern Ry. Co.*, 55 S. E. Rep. 142 (S. C.).

The defendant can be held on the ground that it has a duty, at least in reply to inquiries, to give passengers information necessary for their journey. *Dwinelle* v. *N. Y. C., etc., R. R. Co.*, 120 N. Y. 117. Also, the failure to mention the situation at Savannah was practically the same as saying that there was no quarantine there. This would bring the case under a rule more frequently applied, that passengers can rely upon information given them by the carrier. *Penna. Co.* v. *Hoagland*, 78 Ind. 203. The American courts seem to hold that the carrier assumes both the above obligations as an incident to its business. This seems just. England has worked out liability for giving false information on the analogy of deceit. *Denton* v. *Great Northern Ry. Co.*, 5 E. & B. 860. A similar rule prevails as to carriers of goods. If a railroad takes freight knowing it will be delayed by press of business or some similar cause, it is liable for the delay. *Thomas* v. *Wabash, etc., Ry. Co.*, 63 Fed. Rep. 200. Some jurisdictions limit this rule to cases where the shipper does not know of the circumstances at the time of shipment. *Nelson* v. *Great Northern Ry. Co.*, 28 Mont. 297.

CONFLICT OF LAWS — SUCCESSION — BY WHAT LAW DOMICILE DETERMINED. — A British subject, born in England, acquired in France a domicile of choice in fact, though he never acquired a legal domicile in the manner prescribed by French law. He died in France, leaving a will disposing of English movables. *Held*, that as to validity, construction, and administration, the will is governed by English law. *In re Bowes*, 22 T. L. R. 711 (Eng., Ch. D., July 18, 1906). See NOTES, p. 226.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — SELF-INCRIMINATION IN CONTEMPT PROCEEDINGS. — The defendant had been restrained from committing acts of boycott against the plaintiff, and had disobeyed the injunction. On an order to produce its records in contempt proceedings the defendant claimed exemption under the constitutional provision that "no person shall in any criminal case be compelled to be a witness against himself." *Held*, that when contempt proceedings are to vindicate an essentially civil right, the constitutional provision does not apply. *Patterson* v. *Wyoming Dist. Council*, 31 Pa. Super. Ct. 112.

The distinction between contempt proceedings criminal and civil has long been recognized. 4 BLACK., COMM., 285. Those instituted solely to vindicate the dignity of the court are punitive and criminal, while those instituted by individuals for the purpose of protecting or enforcing some right are remedial and civil. *Thompson* v. *Penna. Ry. Co.*, 48 N. J. Eq. 105. The cases making this distinction have in general involved the existence of criminal intent, and it has been held unnecessary to find such intent in contempt proceedings civil in nature. *Indianapolis Water Co.* v. *American Strawboard Co.*, 75 Fed. Rep. 972. The court here seems justified in going a step further and applying the distinction to the rule against self-incrimination. The Fifth Amendment is interpreted as applying to cases criminal in nature though civil in form; — *e. g.*, in civil proceedings to collect a statutory penalty the defendant is protected. *Boyd v. United States*, 116 U. S. 616. The reverse should also be true, and if the proceedings are civil in nature and purpose, though criminal in form and punishment, the defendant should not be allowed immunity. Such is the case here, for contempt proceedings to discover and punish the violation of an injunction are in the nature of civil attachments. *People* v. *Court of Oyer and Term.*, 101 N. Y. 245.

CONTRACTS — ANTICIPATORY BREACH — APPLICATION TO INSURANCE CONTRACTS. — The plaintiff sued the defendant corporation for damages for breach of contract, alleging that the defendant had broken the contract to insure his life by declaring it void and forfeited. *Held*, that the plaintiff has no right of action before the time for performance by the defendant has arrived. *Kelly* v. *Security, etc., Ins. Co.*, 36 N. Y. L. J. 109 (N. Y., Ct. App., Oct. 2, 1906).

The doctrine of anticipatory breach has been regarded as in force in New York. See *Ferris* v. *Spooner*, 102 N. Y. 10. And the court in the present case acknowledges its establishment, but refuses to extend it to insurance contracts. There seems to be no reason for making such a contract an exception to the rule. It is hard to imagine any class of contracts where the argument of the practical convenience of a present action applies with as much force as in life insurance contracts. And the doctrine has been applied to these contracts elsewhere. *O'Neill* v. *Supreme Council*, 70 N. J. L. 410. But the present court seems strongly affected by the analogy to promissory notes, to which the application of the doctrine has been denied. *Benecke* v. *Haebler*, 38 N. Y. App. Div. 344. It has also been denied application where one side of a contract has been executed. *Flinn* v. *Mowry*, 131 Cal. 481. But since the present case is not analogous to these established exceptions, the policy not being paid up, it seems to indicate another halt in the logical extension of an illogical rule. In insurance cases, however, granting the above, recovery may well be allowed on other grounds. See 17 HARV. L. REV. 46.

CORPORATIONS — DE FACTO CORPORATIONS — COLLATERAL ATTACK ON GROUND OF FRAUD IN INCORPORATION. — The defendants were shareholders

in an organization purporting to have been incorporated under the general laws of Missouri. The plaintiff, suing on a note of the organization, attempted to hold them to individual liability on the ground that the incorporation was fraudulent and void, in that the statements required by the statute as to capital stock subscribed and paid in, though made in due form, were knowingly false. *Held*, that in such an action the validity of the incorporation cannot be attacked on the ground of fraud. *First National Bank* v. *Rockefeller*, 93 S. W. Rep. 761 (Mo., Sup. Ct.). See NOTES, p. 222.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — POWER OF DIRECTORS TO APPOINT EXECUTIVE COMMITTEES. — The stockholders of the appellant corporation by a by-law authorized their board of directors to appoint from among themselves an executive committee, with the full powers of the board when the latter was not in session. The board did so create an executive committee. *Semble*, that the board, though authorized as it is, cannot legally create such a committee. *Canada-Atlantic and Plant S. S. Co., Ltd.* v. *Flanders*, 145 Fed. Rep. 875 (C. C. A., First Circ.). See NOTES, p. 225.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — BINDING EFFECT ON STOCKHOLDERS OF CONTRACT MADE BY CORPORATION. — The X corporation, with the assent of the individual defendants, its principal stockholders, sold all of its property, including good will, to the plaintiff, and covenanted that it would no longer engage in the same business. The individual defendants with others thereafter formed the defendant corporation, which proceeded to carry on that same line of business. *Held*, that neither the individual defendants nor the defendant corporation is precluded from so doing by the contract of the X corporation. *Hall's Safe Co.* v. *Herring, etc., Co.*, 146 Fed. Rep. 37 (C. C. A., Sixth Circ.). See NOTES, p. 223.

CORPORATIONS — FOREIGN CORPORATIONS — LIABILITY OF FOREIGN CORPORATION TO INCOME TAX. — The English Income Tax Act of 1853 provided that any person residing in the United Kingdom should be taxed on his annual gains or profits, etc. The defendant, a foreign corporation, was registered in South Africa, but "kept house and did its real business" in London. *Held*, that it is "resident" in England within the meaning of the Act, and is liable to taxation on its entire net income thereunder. *De Beers, etc., Mines, Ltd.* v. *Howe*, [1906] A. C. 455.

In America, by the great weight of authority, a corporation cannot exist where the law which creates it does not operate. *Bank of Augusta* v. *Earle*, 13 Pet. (U. S.) 519, 588. It cannot, therefore, be served or sued in another state, except by its own consent. *St. Clair* v. *Cox*, 106 U. S. 350. A state may not lay a personal tax on one not domiciled therein. *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300. But it may tax, as tangible personalty, income received within its jurisdiction by a foreign corporation. *Liverpool, etc., Ins. Co.* v. *Massachusetts*, 10 Wall. (U. S.) 566. In substance, therefore, the American rule seems to be that a state may tax the property, but not the person of a foreign corporation. In England, however, the courts have already broken over the theory that a corporation cannot exist outside the state of its creation. A foreign corporation doing business in England may, apparently irrespective of consent, be served and sued. *Newby* v. *Van Oppen, etc., Co.*, L. R. 7 Q. B. 293; "*La Bourgogne*," [1899] A. C. 431. The theory is that the corporation, by doing business therein through agents, becomes to that extent at least "resident" in England. The present case carries out the doctrine so as to render the corporation liable to a personal tax. If a foreign corporation be held to exist for purposes of suit and personal taxation, it would seem difficult, logically at least, to deny its legal existence for any purpose. *Cf.* 20 HARV. L. REV. 78.

COVENANTS RUNNING WITH LAND — CONDITION IN EXECUTORY CONTRACT FOR SALE OF LAND. — The owners of certain land contracted to convey part of it to the defendant, with the express condition that the latter should build a fence on its eastern side before taking possession. Later, the

vendor granted his land bordering on the eastern line of this tract to the lessor of the plaintiff. The defendant entered without constructing a fence, and began to build a railroad. The plaintiff brought action to recover the value of a cow which had been killed owing to the defendant's failure to fence. *Held*, that the condition to fence is a covenant running with the land and that the plaintiff is entitled to recover. *Indianapolis, etc., Co.* v. *Harbaugh*, 78 N. E. Rep. 80 (Ind., App. Ct.).

Oral agreements will not be construed as covenants running with the land. *Morss* v. *Boston, etc., Co.*, 2 Cush. (Mass.) 536. And an unsealed written contract to fence has been held to bind only the parties to it. *Vandegrift* v. *Delaware R. R. Co.*, 2 Houst. (Del.) 287. But stipulations in deeds poll not signed by the grantees are held binding on future grantees. *Post* v. *West Shore R. R. Co.*, 50 Hun (N. Y.) 301; *contra*, *Pearson* v. *Bailey*, 177 Mass. 318. And it is not fatal that the covenant is not mentioned in the deed, if it is part of the same transaction. *Hills* v. *Miller*, 3 Paige (N. Y.) 254. But in all these cases there was a grant from the covenantee to the covenantor, creating a privity of estate. Without privity of estate there can be no covenant running with the land. *Hurd* v. *Curtis*, 19 Pick. (Mass.) 459. In the present case there is neither a covenant in the true sense, since the writing was unsealed, nor has there been any conveyance between the covenantee and the covenantor so as to create privity of estate. It is difficult to perceive any grounds upon which to support the decision. *Cf. Moxley* v. *New Jersey, etc., Co.*, 21 N. Y. Supp. 347.

CRIMINAL LAW — TRIAL — ABSENCE OF ACCUSED THROUGH MISCONDUCT. — The defendant, indicted for a misdemeanor, when brought into court to plead so misconducted herself that it was impossible to take her plea. She was twice removed and informed that if she persisted in her misbehavior she would be tried in her absence. A plea of not guilty was entered for her in her absence. The jail surgeon, being summoned, said that the defendant was quite sane and capable of understanding the nature of the charge and proceedings against her. The defendant was then tried, convicted and sentenced in her absence. *Held*, that such procedure is valid. *Rex* v. *Mary Browne*, 70 J. P. 472 (Eng., Cent. Crim. Ct., Sept. 14, 1906).

A defendant indicted for a misdemeanor punishable by imprisonment, as in the principal case, is entitled to plead in person at his arraignment and to be present throughout his trial. *Rose* v. *State*, 20 Oh. St. 31; see BISHOP, NEW CRIM. PROCEDURE, § 268. But if it is impossible for him to be brought into court because of insanity, or if he misbehave so as to stop proceedings, he loses his right to be present, and the arraignment and trial may be conducted in his absence. *United States* v. *Davis*, 6 Blatchf. (U. S.) 464. Though the principal case is sound on this latter point, it is objectionable because of the way in which the plea was entered. In cases where the defendant stands mute on arraignment, as did the defendant in the present case, the correct procedure at common law is for the court to empanel a jury to determine whether the accused stands mute through malice or by act of God. *Reg.* v. *Israel*, 2 Cox C. C. 263. If the former is found to be true, then, under the English Statute of 7 and 8 Geo. IV, c. 28, § 2, the judge may enter a plea of not guilty. The entering of such a plea before such a determination by the jury was clearly unwarranted.

DAMAGES — MEASURE OF DAMAGES — GOOD WILL. — The plaintiff sued the defendant for fraudulently inducing him to sell stock in an unlisted corporation at an inadequate price. *Held*, that the good will of the corporation is an element to be considered in estimating the damages, and that the value of such good will can fairly be estimated by multiplying the average annual net profits by a number of years suitable with reference to the particular business; the determination of such number of years to be submitted to the jury as a question of fact. *Von Au* v. *Magenheimer*, 100 N. Y. Supp. 659.

This seems to be the first case to lay down any general rule for the valuation of good will. *Cf. Mellersh* v. *Keen*, 28 Beav. 453; *Page* v. *Ratliffe*, 75 L. T. R. 371. From one American case it seems a necessary inference that the good will of a

listed corporation is the difference between the amount actually invested and the market price of the stock. *Adams Express Co.* v. *Kentucky*, 166 U. S. 171. But this rule is not applicable to unlisted stock. The rule in the case at hand is equally useless. The jury being allowed to use as a multiplier any number of years not inconsistent with the character of the business, is in no better position than if simply instructed to assess the good will. A simple and definite rule would be to deduct from the net annual profits such proportion as might be a reasonable return on the capital invested, considering the nature of the business, and then capitalize the remaining profits at a rate of interest conformable to the risks of the business. However, since this is essentially a question of fact, it may be doubted whether the court should attempt to lay down any rule at all.

DAMAGES — MEASURE OF DAMAGES — IMPROVEMENTS TO CONVERTED PROPERTY. — The defendant cut timber from the plaintiff's land under a *bona fide* belief that the land was the defendant's. The plaintiff waited until the defendant had considerably increased the value of the timber and then exercised his right under the statutory action of replevin to recover damages instead of the property itself. *Held*, that the measure of damages is the enhanced value of the property, less any increase added by the defendant after conversion. *Gustin* v. *Embury Clark Lumber Co.*, 108 N. W. Rep. 650 (Mich.). See NOTES, p. 227.

EASEMENTS — MODES OF ACQUISITION — IMPLIED GRANT OF RIGHT OF WAY. — A testator built four houses with a passage at the back to connect them with the street. There was also access from the front. The houses were devised without any mention of a right of way. *Held*, that a right of way will be implied in favor of the devisees and their successors in title. *Milner's Safe Co.* v. *Great Northern & City Ry. Co.*, 95 L. T. R. 321 (Eng., Ch. D., July 17, 1906).

Where there has been an apparent and continuous use of an estate retained in favor of an estate conveyed away, such use will ordinarily be held to pass to the grantee under the doctrine of an implied grant, when no mention is made of it in the deed. *Ellis* v. *Bassett*, 128 Ind. 118. Many jurisdictions, however, distinguish in the case of a right of way on the ground that the use, since it requires the intervention of human agency, cannot be continuous. *Morgan* v. *Meuth*, 60 Mich. 238. Such a distinction seems arbitrary. The real considerations should be whether the use is apparent, and was intended as a permanent benefit for the part conveyed away. *Baker* v. *Rice*, 56 Oh. St. 463. Judged by these requisites the decision in the principal case is sound. The result is surely desirable, and is in accord with the weight of authority in England. *Brown* v. *Alabaster*, 37 Ch. D. 490; *contra*, *Thomson* v. *Waterlow*, L. R. 6 Eq. 36. In this country the tendency of the decisions is in the opposite direction, the idea being that the doctrine of implied grant is against the spirit of our registry laws. *Whiting* v. *Gaylord*, 66 Conn. 337. But this reasoning applies to all classes of easements as well as to rights of way.

EQUITY — PRIORITY OF EQUITIES — RIGHT OF DEFRAUDED JUDGMENT DEBTOR AGAINST BONA FIDE PAYEE OF JUDGMENT PROCEEDS. — The beneficiary of an insurance policy obtained a judgment thereon by fraud, the amount of which was paid into court. By order of the fraudulent judgment creditor the clerk of court paid a portion of this very money to the defendants, who took in good faith and for value. The judgment debtor, having discovered the fraud, filed a bill in equity to restrain the defendants from setting up the fraudulent judgment, and to compel repayment of the money received thereunder. *Held*, that, even though the judgment be fraudulent, the equities of the plaintiff and defendants are equal, and hence the latter, in whom is the legal title, prevail. Two justices dissented. *Fidelity Mutual Life Ins. Co.* v. *Clark*, U. S. Sup. Ct., Oct. 29, 1906.

Where a plaintiff, upon the ground of an alleged equity, proceeds against one who has the legal title, he must show as the gist of the action, whether it be quasi-contractual or in equity, that it is against good conscience for the de-

fendant to retain the *res*. *Haven* v. *Foster*, 9 Pick. (Mass.) 112; *Dean* v. *Anderson*, 34 N. J. Eq. 496. If the defendant received the legal title in good faith, but without giving value, it is unjust that he should make a profit at the plaintiff's expense. *Haven* v. *Foster*, *supra*. If the defendant received the legal title with notice of the plaintiff's equity, his conscience is charged with that equity, even though he gave value. *Mackreth* v. *Symmons*, 15 Ves. 329. If, however, the defendant took title for value and without notice, the plaintiff cannot prevail. *Cave* v. *Cave*, 15 Ch. D. 639. In such a case, since the equities of both parties are equal, the court refrains from interference, leaving the loss where it has fallen. *Price* v. *Neal*, 3 Burr. 1354. In the case at hand the title to the money passed to the judgment creditor, and from her to the defendants for value and without notice. The plaintiff, therefore, shows no ground for relief.

ESTOPPEL — ESTOPPEL IN PAIS — OBJECTION TO COURT'S JURISDICTION. — The defendant in a suit in equity filed a cross-bill asking for affirmative relief, which was granted. The plaintiff appealed, and the defendant urged that the bill should be dismissed because the court did not have jurisdiction on account of the smallness of the amount involved. *Held*, that the defendant is estopped from setting up the court's lack of jurisdiction. *Champion* v. *Grand Rapids, etc., Ry. Co.*, 108 N. W. Rep. 1078 (Mich.).

Extending the court's jurisdiction by estoppel in such instances would seem to be incorrect. See 20 HARV. L. REV. 150.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT-MATTER — FEDERAL JURISDICTION UNDER WAR AMENDMENTS. — § 5508 of the United States Revised Statutes prohibits conspiracy to intimidate any citizen in the free exercise of any right secured by the Constitution or laws of the United States. Under this statute the plaintiffs in error were indicted for coercing certain negroes into abandoning their contracts. *Held*, that the indictment is demurrable, as the federal courts have no jurisdiction of the wrong charged. *Hodges* v. *United States*, 27 Sup. Ct. Rep. 6.

The dissenting opinion suggests that the case may involve a decision that § 5508 of the Revised Statutes is unconstitutional. Though the court does not clearly specify its ground of decision, it is obvious that the alternative view, that the case is not within the statute, is the true basis of the holding of the court. The constitutionality of the statute itself is beyond doubt. *Ex parte Yarbrough*, 110 U. S. 651. The real problem which the case presents, then, is whether the right in question here is a right secured by the Constitution or laws of the United States. If it be so secured, it is admittedly so only under the Thirteenth Amendment, — the Fourteenth referring only to state acts. It has been held in elaborate circuit court opinions that the Thirteenth Amendment forbidding slavery protects rights similar to those involved here, on the ground that the infringement of such rights is the imposition of a "badge" or incident of slavery. *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; *United States* v. *Morris*, 125 Fed. Rep. 322. The present case apparently overrules these cases, and at least checks their tendency toward perhaps a strained construction of the Thirteenth Amendment. *Cf. United States* v. *Harris*, 106 U. S. 629.

HABEAS CORPUS — RIGHT OF APPEAL — PROCEEDINGS BETWEEN CLAIMANTS FOR CUSTODY OF CHILD. — In *habeas corpus* proceedings the plaintiff had been ordered to give up the possession of a child and had moved for a new trial. The defendant judge having refused to consider the motion, the plaintiff applied to the Supreme Court for a writ of *mandamus* to compel the defendant to pass upon it. *Held*, that the *mandamus* may issue since the judgment is appealable. *Bleakley* v. *Smart, Judge*, 87 Pac. Rep. 76 (Kan.).

Generally, except by statute, a judgment in *habeas corpus* is neither *res judicata* nor subject to review. *Skinner* v. *Sedgbur*, 8 Kan. App. 624; *contra*, *State ex rel. McCaslin* v. *Smith*, 65 Wis. 93. An exception to this rule is generally made when the petition concerns the custody of an infant. *People ex rel. Green* v. *The Court of Appeals*, 27 Colo. 405; *contra*, *Mathews* v. *Hobbs*,

51 Ala. 210. In such a case the alleged restraint may be illegal, either because it deprives the child of liberty or because it is imposed by one not legally entitled to the child's custody. Logically, in *habeas corpus* the latter wrong should be considered only as it is presumed to affect the former. See *The State ex rel. Baird* v. *Baird and Torrey*, 19 N. J. Eq. 481. Practically this distinction is so difficult to make that *habeas corpus* becomes a means of settling the claims of parents and guardians generally. *Cormack* v. *Marshall*, 211 Ill. 519. Since the proceedings have assumed this character, the present case seems right in holding the judgment reviewable, because the real liberty of the child is sufficiently protected by allowing a new writ upon any change of circumstances which might be presumed to restrain the child's liberty. *In re King*, 66 Kan. 695.

INFANTS — CONTRACTS — EFFECT OF FALSE REPRESENTATIONS AS TO AGE. — The defendant, an infant, executed a trust deed to the plaintiff as part consideration for the sale of a livery business. The defendant appeared over twenty-one years old and expressly stated that he was of age. *Held*, that on account of the fraud the infant cannot set up his age as a defense in an action to enforce the deed of trust. *Commander* v. *Brazil*, 41 So. Rep. 497 (Miss.).

While this case is in line with previous Mississippi decisions, and though it may reach an individually just result, it is against the great weight of authority and is clearly wrong, being contrary to the policy and principles underlying the voidability of infants' contracts. *Wieland* v. *Kobick*, 110 Ill. 16. In England a claim against an infant like that in the principal case will not support a petition in bankruptcy, because it is not a debt. *Ex parte Jones*, 18 Ch. D. 109. Nor is fraud there a good replication either in law or in equity to a plea of infancy. *Bartlett* v. *Wells*, 1 B. & S. 836. The doctrine of the principal case has been adopted by statute in Iowa and Kansas. But there is no real need of it, since the infant can be held *ex delicto*. *Rice* v. *Boyer*, 108 Ind. 472. Allowing this redress is not a violation of the principle that an infant will not be liable in tort where so to hold him would be merely indirectly enforcing his contract, because in such an action the contract is treated as of no effect, and the penalty assessed is not based on the contract, but on the actual loss due to the deceit. *Cf.* 20 HARV. L. REV. 64.

INJUNCTIONS — ACTS RESTRAINED — COLLECTION OF PENALTIES UNDER ALLEGED UNCONSTITUTIONAL STATUTE. — A New York statute limited the price of gas to eighty cents per thousand feet, and fixed a penalty for each overcharge by the gas company. *Held*, that, pending a suit to determine the constitutionality of the statute, the officers charged with the enforcement of the penalty shall be restrained from proceeding, but all charges collected in excess of that fixed shall be impounded to abide the outcome of the suit. *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 150 (Circ. Ct., S. D. N. Y.).

Ordinarily equity will not interfere with criminal proceedings. But where irreparable damage would otherwise follow, the majority of the many conflicting cases will be found to hold that equity will restrain the enforcement of penalties under a statute affecting property rights which the court deems unconstitutional. *Smyth* v. *Ames*, 169 U. S. 466. A few courts, refusing to consider the constitutionality question, decline to enjoin such proceedings. *Boin* v. *Town of Jennings*, 107 La. 410. The same considerations should apply when temporary relief is asked pending the decision of constitutionality. The fact that there would be irreparable damage in spite of an ultimate decision favorable to the plaintiff should secure an injunction from equity, but on such terms as will work justice in the event of a contrary holding. This involves no presumption as to constitutionality, but is merely an equitable attempt to do justice whatever the final outcome. Equity takes this stand when relief *pendente lite* is sought against an alleged tort, and in other analogous cases of doubtful right. *Denver, etc., R. R. Co.* v. *United States*, 124 Fed. Rep. 156; *Harriman* v. *Northern Securities Co.*, 132 Fed. Rep. 464. The decree at hand is accordingly correct on principle, and it is supported by precedent as well. *New Memphis Gas & Light Co.* v. *City of Memphis*, 72 Fed. Rep. 952.

JUDGMENTS — COLLATERAL ATTACK — FRAUD IN OBTAINING JURISDICTION OF NECESSARY PARTY. — The signature on an acknowledgment of a service of process without the state, in a divorce suit brought by a husband in Texas, was either a forgery or else obtained from the wife by fraudulent representation. A decree of divorce was granted. *Held*, that, in either case, such decree is no defense to a suit afterwards brought by the wife in Alabama, since jurisdiction of the wife was never acquired in the first action. *Ingram* v. *Ingram*, 42 So. Rep. 24 (Ala.).

If the court rendering a decree has jurisdiction, that decree is not open to collateral attack by the same parties. *Nicholson* v. *Nicholson*, 113 Ind. 131. If there was no jurisdiction, it is open to such attack in another state; for, under these circumstances, no valid decree could be given. *Parish* v. *Parish*, 32 Ga. 653; see 19 HARV. L. REV. 384. The simple question, therefore, is, did the acknowledgment of service, assuming it was fraudulently obtained, give the Texas court jurisdiction? It is hard to see why it did not. See *Townsend* v. *Smith*, 47 Wis. 623, 626. The case is in no wise different, in so far as the acquisition of jurisdiction is concerned, from those cases where a defendant is brought within the limits of a state by fraud or by force, in violation of extradition rights; and it is there held, that, in spite of the method adopted, jurisdiction is nevertheless acquired. *Ex parte Moyer*, 85 Pac. Rep. 897 (Idaho); *Mahon* v. *Justice*, 127 U. S. 700. The fraud, though it does not prevent jurisdiction, furnishes, in the case of civil suits, a ground for directly impeaching the decree in the state which thus acquired control, or may be a valid defense to any suit seeking directly to enforce the decree in another state. *Dunlap* v. *Cody*, 31 Ia. 260.

LANDLORD AND TENANT — TERMS FOR YEARS — CONVEYANCE OF STANDING TIMBER. — The plaintiff sold and conveyed by deed to the defendant all the trees on a certain tract of land, provisos being inserted that the grantee should have rights of way, that the timber was to be removed within three years from a fixed date, and that all "timber remaining on the premises should revert and become the property of the plaintiff." After the expiration of the three years the plaintiff brought a warrant of forcible detainer against the defendant, under a statute which declared "the refusal of a tenant to give possession to his landlord after the expiration of his term" to be a forcible entry. *Held*, that the deed created a tenancy, and that therefore the writ is maintainable. *Alexander* v. *Gardner*, 96 S. W. Rep. 818 (Ky.).

The court in finding a tenancy here seems to have been unduly influenced by the consideration that this grantee could assign his rights and was therefore not a licensee. But a license coupled with an interest is irrevocable and may be assigned. *Heflin* v. *Bingham*, 56 Ala. 566. For a discussion of the principles involved, see 17 HARV. L. REV. 411.

LEGACIES — ADEMPTION — CHANGE ACCOMPLISHED BY OPERATION OF LAW. — A testator bequeathed the "interest arising from money invested in the Lambeth Waterworks Co." to his daughter for life. Between the date of his will and the date of his death an Act of Parliament created a Metropolitan Water Board, and vested the undertaking of the Waterworks Co. in it. A block of Metropolitan Water Board stock was issued to the testator as compensation for the stock which at the date of his will he held in the Waterworks Co. *Held*, that the new stock does not pass under the bequest. *Slater* v. *Slater*, [1906] 2 Ch. 480.

Whether or not a legacy had been adeemed was originally made to depend upon the intention of the testator. It was accordingly held that a change accomplished by operation of law would not extinguish a legacy. *Partridge* v. *Partridge*, Cas. t. Talb. 226; *Walton* v. *Walton*, 7 Johns. Ch. (N. Y.) 258. But the late English cases show clearly that the intention of the testator no longer governs, and that the specific thing bequeathed must still exist. *In re Bridle*, 4 C. P. D. 336. This great change is based on the Wills Act, which provides that descriptions of gifts shall refer, *prima facie*, to property answering that description at the time of the testator's death. See *Goodlad* v. *Burnett*, 1 Kay & J.

341. The present decision makes it clear that no extrinsic circumstance whatever will be sufficient to show that the testator did not intend the legacy to be adeemed. Probably the American courts would not go to this length. In a state which has adopted the above section of the Wills Act, the supposed intention of a testator was held to require the substitution of a money equivalent for certain stock bequeathed. *Mahoney* v. *Holt*, 19 R. I. 660.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — PHOTOGRAPH OF WRONG PERSON PUBLISHED IN CONNECTION WITH SENSATIONAL ARTICLE. — The defendant corporation published an article under the title "Suicide Fiend," relating various attempts to commit suicide. Under the name of the person described appeared a photograph of the plaintiff. *Held*, that an order overruling the demurrer to the complaint be affirmed. *Wandt* v. *Hearst's Chicago American*, 109 N. W. Rep. 70 (Wis.).

For a discussion of the principles involved, see 17 HARV. L. REV. 359.

NEGLIGENCE — BURDEN OF PROOF — RES IPSA LOQUITUR BETWEEN MASTER AND SERVANT. — The plaintiff's intestate, a servant of the defendant, was riding in the elevator in his employer's building where he worked. After the elevator had gone a few feet, the bottom of it was torn out, and the plaintiff fell to the basement and was killed. *Held*, that the maxim *res ipsa loquitur* applies. *John Samuels, Adm'r* v. *John McKesson, Jr.*, 113 N. Y. App. Div. 497. See NOTES, p. 228.

PUBLIC OFFICES — COMPENSATION — RIGHTS WHERE SALARY HAS BEEN PAID DE FACTO OFFICER. — A *de jure* town marshal instituted *quo warranto* proceedings against a *de facto* incumbent and secured an order of ouster, just at the end of the term, and a judgment against the incumbent for the amount of the salary. The judgment proved uncollectible, and action was brought against the town for the salary. *Held*, that on the grounds of public policy and also of estoppel by election of remedies, there can be no recovery. *Samuels* v. *Town of Harrington*, 86 Pac. Rep. 1071 (Wash.).

For a discussion of the liability of a municipal corporation in such cases, see 7 HARV. L. REV. 54; 15 *ibid.* 675.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO RULE — OPTION TO PURCHASE FEE. — Land was demised for thirty years by the defendants' testatrix, with an agreement that the lessor, her heirs or assigns, would, at any time within the thirty years, convey the fee to the lessees, their successors or assigns, upon payment of a certain sum. The successor of the original lessees chose to exercise this option, but the devisees of the lessor refused to convey. *Held*, that a bill for specific performance will not lie, the option being in violation of the rule against perpetuities, but that damages can be recovered for the breach of contract. *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

This option was clearly unenforceable in equity. *Woodall* v. *Clifton*, [1905] 2 Ch. 257; see GRAY, RULE PERP., 2 ed., § 230 b; 18 HARV. L. REV. 379. The court, however, allowed a recovery in damages on the ground that, as the rule against perpetuities only affects property rights, and since at common law no estate would be created in the land, there was no objection to enforcing a legal remedy. Equity, according to the court, refuses to interfere because doing so would create a property right. In short, the reason why the covenant was held valid at law in this case is because it was invalid in equity. This view is certainly odd. Specific performance should be refused on the broader ground that any contract or covenant, which, if enforced, would create an interest in land in violation of the rule against perpetuities, is absolutely void. See 42 SOL. J. 650. Therefore a recovery in damages should be denied. Opposed to the one dictum cited in the case in support of the opinion are numerous authorities, at least one of which maintains that a contract infringing the rule against perpetuities is entirely analogous to a contract against public morals. *Poole's Case*, Moore's Rep. 810; *Jervis* v. *Bruton*, 2 Vern. 251; see also *Egerton* v. *Carl Brownlow*, 4 H. L. Cas. 1, 125; GRAY, RESTRAINTS ALIEN., § 77.

RULE AGAINST PERPETUITIES — UNCERTAINTY — POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — A testator gave the residue of his estate to a trustee "for as long a period as is legally possible," to make annual payments to forty-two annuitants and (with three exceptions) to their heirs, and at the end of that time to divide the trust fund equally among the persons then entitled to the annuities. *Held*, that the gift over is valid and vests twenty-one years after the death of the last surviving annuitant. *Fitchie* v. *Brown*, Sup. Ct. of Hawaii, November 1, 1906. See NOTES, p. 220.

SALES — ELECTION OF REMEDIES — WRONGFUL DELIVERY BY CARRIER. — The plaintiff shipped goods by the defendant carrier with instructions to notify the purchaser and deliver on presentation of the bill of lading. The defendant wrongfully delivered without requiring the bill, and later the plaintiff received from the purchaser part payment in cash and a check for the balance. The check was dishonored and the defendant was sued for the balance of the purchase money. *Held*, that the plaintiff has waived his right against the defendant by treating directly with the purchaser. *Callaway & Truitt* v. *Southern R. R. Co.*, 55 S. E. Rep. 22 (Ga.).

It is not disputed that on delivery the defendant became liable for the conversion, and that the plaintiff had then a choice of remedies, — to sue either the carrier or the purchaser. *Furman* v. *Union Pacific R. R. Co.*, 106 N. Y. 579. There is considerable difference of opinion as to what act is sufficient to show a conclusive election. It is generally held, and it seems correctly, that an unsatisfied demand on the purchaser for payment is not a bar to a subsequent action *ex delicto* against the carrier. *McSwegan* v. *Penna. Ry. Co.*, 7 N. Y. App. Div. 301. On the other hand the weight of authority holds that the institution of legal proceedings against one party is a waiver of all rights against the other arising from the same facts. See *Robb* v. *Vos*, 155 U. S. 13, 41. Between these limits the law is unsettled, but the true rule seems to be that, if the plaintiff has done an act which would not be justifiable had he elected to sue the defendant, that act in itself amounts to an election. *Scarf* v. *Jardine*, 7 App. Cas. 345. And the acceptance of part payment seems to be an act sufficiently decisive to show an intention to waive.

SALVAGE — SUBJECTS OF SALVAGE — LIABILITY OF UNITED STATES FOR DUTIES SAVED. — Goods on which duty had been paid were saved by salvors from loss by fire. The Secretary of the Treasury was authorized to refund the duty paid in case of loss under such circumstances, by U. S. Rev. Stat., §§ 2984, 3689. Under an admiralty rule, "in all suits for salvage the suit may be . . . *in personam* against the party at whose request or for whose benefit the salvage service has been performed." *Held*, that the salvor is entitled to rest his case on the assumption that the Secretary of the Treasury would have refunded the duty in case of loss, and can recover in an action *in personam* for the saving of the duty to the government. *United States* v. *Cornell Steamboat Co.*, 202 U. S. 184.

Originally only the owners of the property were liable for the salvor's claim. In England such liability has recently been extended to persons interested in the preservation of the property; in one case to a vendor under absolute liability to deliver goods, and in another to charterers responsible for the negligent management of the ship. *The Five Steel Barges*, 15 P. D. 142; see 15 HARV. L. REV. 232. The present case establishes this extension in the United States. The facts here presented push the doctrine to a considerable length, because of the peculiar nature of the government's interest. The court intimates that had the salvor's work been done immediately before the duties were collected, the United States would have been under no liability, which would be drawing the line at the point where the government's interest became direct. The recognized doctrine that salvage is a mixed question of private right and public policy appears fully to justify the decision. See *The Alboin*, Lush. 282, 284. The English court has been careful not to commit itself as to how far it would be willing to extend the doctrine. See *The Cargo*

ex Port Victor, [1901] P. D. 243, 257. The question of the liability of insurers, mortgagees, etc., remains still open in both countries.

TELEGRAPH AND TELEPHONE COMPANIES — STATUS OF COMPANIES AS ENGAGED IN PUBLIC EMPLOYMENT — OBLIGATION TO SERVE ALL AT REASONABLE PRICES. — The plaintiffs contracted with the defendant telephone company with the condition that they should connect no foreign telephone attachments to the main instrument installed by the defendant. The defendant having demanded an unreasonable price for such attachments, the plaintiffs in violation of the condition in their contract connected their own. The defendant thereupon stopped the plaintiffs' service, and the latter sought an injunction. *Held*, that providing the plaintiffs disconnect the attachments, the defendant be enjoined from interrupting the service over the main instrument. *Beach* v. *Chicago Telephone Co.*, 39 Chi. Leg. N. 81 (Ill., Circ. Ct., Cook Co., Oct. 17, 1906).

Though a public service company is bound to serve at reasonable rates all proper applicants, it may like private contractors impose reasonable conditions. *Pugh* v. *City, etc., Telephone Ass'n*, 9 Wkly. L. Bul. 104 (Oh., Dist. Ct.). The condition imposed by the defendant in the present case was reasonable, and was therefore originally valid. *Gardner* v. *Providence Telephone Co.*, 23 R. I. 262; *ibid.* 312. But the defendant, having made the installation of attachments a part of its service, should stand ready to provide them at a reasonable price. Inasmuch as it here demanded an unreasonable price, it might properly be said to have waived its right to take advantage of the originally valid condition until it should reduce the price. Thus the stopping of the plaintiff's service was unwarranted. The remedy given here by conditional injunction was defective, in that it did not guard against the probable continued unreasonableness of the defendant's charge for extensions. The court's proper course would have been to impose on the plaintiff the condition of disconnecting his attachment only provided the defendant offered to supply attachments at a reasonable rate. A simpler method, however, would have been for the plaintiff, without attempting self-help, to have applied for a writ of *mandamus*, compelling the defendant to do its common law duty. *State* v. *Nebraska Telephone Co.*, 17 Neb. 126.

TENANCY IN COMMON — EJECTMENT — DISSEISOR SUED BY ONE TENANT IN COMMON ALONE. — In an action to recover land, it was objected that the plaintiff should have joined others alleged to be tenants in common with him. *Held*, that it is not necessary, since, in an action of ejectment, one tenant in common may recover the entire possession from a stranger. *Godfrey* v. *Rowland*, [1906] Haw. 577.

The court took the ground that each tenant in common has a right to possession against all but his co-tenants. *Robinson* v. *Johnson*, 36 Vt. 69. But this position seems unsound in view of the nature of tenancy in common. Since there is no privity of estate, tenants in common could not join at common law, but had to sue separately for an aliquot part. CO. LIT., §§ 292, 311. This has been universally changed either by statute or by judicial legislation, permitting co-tenants to join. *Jackson* v. *Brandt*, 2 Caines (N. Y.) 175. But if they choose to sue separately, there seems to be no good reason for allowing recovery larger than title. *Dewey* v. *Brown*, 2 Pick. (Mass.) 387. This results in the better rule that a tenant in common suing alone can recover only his undivided share, and be let into possession in common with the disseisor. *Butrick* v. *Tilton*, 141 Mass. 93; *Hellyer* v. *King*, L. R. 6 Exch. 791. The present case allows recovery on the weakness of the defendant's right rather than on the strength of the plaintiff's, and relies on the unwarranted presumption that the other co-tenants desire to oust the occupier. It, also, seems to be opposed to the previous tendency in the same jurisdiction. See *Un Wong* v. *Kan Chu*, 5 Haw. 225.

TORTS — LIABILITY TO STRANGER FOR NON-PERFORMANCE OF CONTRACT — FAILURE TO SUPPLY WATER IN CASE OF FIRE. — A water company, in consideration of franchises and privileges and of the right to be paid

by the levy of special taxes, contracted with a municipality to furnish water for extinguishing fires. Because of failure to supply the amount contracted for, a citizen's building was destroyed by fire. *Held*, that the company has assumed a public duty, of which the contract is the measure, and for breach of which the company is answerable to this citizen in tort. *Mugge* v. *Tampa Waterworks Co.*, 42 So. Rep. 81 (Fla.).

For a discussion of the principles involved, see 13 HARV. L. REV. 226. *Cf.* also 19 *ibid.* 467; 15 *ibid.* 767, 784.

TRADE UNIONS — STRIKES — STRIKE AGAINST ONE MAN TO REACH ANOTHER. — Union stone-masons and non-union pointers were competitors for certain work of a special contractor on a building under construction by a general contractor. In order to coerce the former into discharging non-union men, walking delegates, empowered by the rules of their respective unions, caused strikes on other buildings of the general contractor. *Held*, that this is an unlawful conspiracy to interfere with the trade of another, which equity will enjoin. *Picket* v. *Walsh*, 78 N. E. Rep. 753 (Mass.).

It is now almost everywhere law that outsiders cannot be unwillingly dragged into labor disputes. For a discussion of the principles involved, see 17 HARV. L. REV. 558.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

VESTED AND CONTINGENT REMAINDERS. — In a recent article Professor Albert Martin Kales discusses the distinction between vested and contingent remainders, in the light of a new classification of future interests in land which he advances. *Future Interests in Land*, 22 L. Quar. Rev. 250, 383 (July, October, 1906). The classification suggested is based upon a division of all future interests into three mutually exclusive groups, — the division resulting from the fact that a future interest must come into possession either "by way of succession," as when it succeeds immediately the preceding estate; or "by way of interruption," when it cuts short the preceding estate. The three classes are, then: (*a*) estates which by the words of the limitation can come into effect only by way of interruption; (*b*) estates which are so limited that by the words of the limitation they can come into effect only by way of succession; and (*c*) estates which by the words of the limitation might come into effect either by way of succession or by way of interruption.

As to class (*a*), estates which are limited so as to come into possession only by way of interruption, such estates are uniformly held bad under the common law with the sole exception of the right of entry for condition broken, and are valid under the Statutes of Uses and Wills. As to class (*b*), estates intended to take effect only by way of succession, Mr. Kales concludes that all such estates are valid at the common law, even if after terms for years, and even if subject to a condition precedent. All estates in this class are vested remainders, it is said. Lastly, as to class (*c*), estates limited so that they might conceivably come into possession either by way of succession or by way of interruption, it is argued that such estates are, and alone are, contingent remainders. They are good when they actually can come into effect by way of succession, and fail otherwise. After estates for years they are always invalid at the common law, although probably valid under the Statutes of Uses and Wills.[1]

This classification, if correct, offers an excellent rule for distinguishing between vested and contingent remainders, though it must not be forgotten that

[1] Professor Kales notes Adams *v.* Savage, 2 Ld. Raym. 854, as an instance of the conscious reluctance of the judges to give the Statute of Uses its full effect.